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No. 71-253

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN F. BONISTALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED B. UGAST,
Acting Assistant Attorney General,

BENNET N. HOLLANDER,
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Washington, D. C. 20530.

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OPINIONS BELOW

The findings of fact and conclusions of law of the district court (Pet. 25-36) are reported at 318 F. Supp. 1189. The opinion of the court of appeals (Pet. 18-20) is reported at 442 F. 2d 342.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1971. A petition for rehearing was denied on June 24, 1971 (Pet. 17), and a suggestion

for rehearing *en banc* was denied on July 29, 1971 (Pet. 16). The petition for a writ of certiorari was filed on August 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether sufficient probative evidence supports the trial court's findings that petitioner was a responsible officer and willfully failed to pay taxes withheld from the wages of employees of a corporation, thus making him liable under Section 6672 of the Internal Revenue Code of 1954 for a penalty in the amount of the unpaid taxes.

STATUTES INVOLVED

The pertinent provisions of Sections 3102, 3402, 6671, 6672, and 7501 of the Internal Revenue Code of 1954 are set forth in the Appendix, infra, pp. 8-10.

STATEMENT

Petitioner is the former president, general manager and director of American Pottery Company, Inc. (American). On May 5, 1967, the Internal Revenue Service made penalty assessments under Section 6672 of the Code against petitioner and Robert J. Braden, former treasurer, chairman of the board of directors and sole stockholder of American (Exs. A, B),[1] based on American's failure to pay federal income and social security taxes withheld from the wages of its em-

[1] "Ex." refers to the defendant's exhibits in the district court.

ployees during the fourth quarter of 1963 and the first and second quarters of 1964.. (Pet. 18-19; Exs. A, B.)

When petitioner was hired by American on May 7, 1962, Braden was president and chairman of the board, and Robert J. Klipple was general manager. On August 23, 1962, Braden resigned as president and Klipple resigned as general manager, and petitioner became president, general manager and a director of the corporation. Petitioner served in these positions until July 1, 1964. (R. 19-20, 26-27;[2] Pet. 26-27.)

Braden and James J. Roach, American's office manager, testified that during the period in issue, they regarded petitioner as being in control of the corporation (Supp. R. 19-20, 68;[3] Pet. 19, 27). Petitioner hired and fired administrative and supervisory personnel, determined which creditors would be paid, and was authorized to sign checks. (R. 21; Supp. R. 72-73; Pet. 27.)

During this time, petitioner was aware of American's obligation to pay to the government the taxes withheld from the employees. The withheld taxes were placed in a general, rather than an escrow, account. While American had sufficient funds to pay the withheld taxes, and made payroll and other payments, the taxes were not paid as required. (R. 21, 24-25; Supp. R. 68-71, 140; Pet. 20, 27, 29.)

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[2] "R." refers to the Appendix bound with petitioner's brief in the court of appeals.

[3] "Supp. R." refers to the separately bound Supplementary Appendix in the court of appeals.

The Internal Revenue Service subsequently seized and sold American's assets, and applied the proceeds to American's tax liabilities. There remained an unpaid balance for the period in issue, in the amount of the assessments made against petitioner and Braden. (Ex. J; R. 25; Pet. 29-30.)

Braden paid some of the taxes assessed and filed this suit for refund. (R. 25; Pet. 18.) The government counter-claimed for the balance of the assessment and joined petitioner as a third-party defendant. (Pet. 18-19.) After a bench trial, the district court found that petitioner and Braden were responsible officers of American and willfully failed to pay over the taxes withheld by the corporation, and accordingly were liable, jointly, for the Section 6672 penalty (Pet. 36). Braden did not appeal, and the judgment against petitioner was affirmed *per curiam* (Pet. 18-20).

ARGUMENT

The decision below is correct. There is no conflict of decisions or other reason for further review.

1. The sole issue is whether sufficient evidence supports the district court's findings of fact, which the court of appeals, after review of the whole record, sustained as not clearly erroneous. This factual issue does not warrant review by the Court.[4]

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[4] Though petitioner claims that "new evidence [was] submitted to the Court of Appeals" (Pet. 2), the matters on which he relies (see Pet. 5-11) are collateral and cumulative of the facts before the district court.

In general, those "high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursal of funds" are responsible officers under Section 6672. *Monday* v. *United States*, 421 F. 2d 1210, 1214-1215 (C.A. 7), certiorari denied, 400 U.S. 821. The statute does not require that exclusive control over all corporate affairs be vested in only one official; there can be more than one "responsible" officer. *Monday* v. *United States*, *supra*; *Scott* v. *United States*, 354 F. 2d 292 (Ct. Cl.). Braden and Roach testified that petitioner was the president and general manager of the corporation with significant responsibility and authority in its operation. While petitioner maintained that he was merely the general sales manager and had authority only for product development and marketing, the trier of fact resolved the conflict in testimony against him. And the fact that other corporate officials were also responsible officers, which he asserts (Pet. 6-7), does not preclude his liability.

The "willfullness" requirement under Section 6672 is satisfied by a conscious failure to pay over the withheld taxes, and does not require a criminal or other bad motive on the part of the responsible officer. *Monday* v. *United States*, *supra*; *Scott* v. *United States*, *supra*; *Spivak* v. *United States*, 370 F. 2d 612, 615 (C.A. 2), certiorari denied, 387 U.S. 908; *Cross* v. *United States*, 311 F. 2d 90, 94 (C.A. 4); *Hewitt* v. *United States*, 377 F. 2d 921, 924 (C.A. 5); *Bloom* v. *United States*, 272 F. 2d 215, 223 (C.A. 9), certiorari denied, 363 U.S. 803. Petitioner ad-

mitted (Supp. R. 140) that he was aware of the corporate obligation to withhold and pay over federal income and social security taxes. Though petitioner contends (Pet. 11) that he did not know the taxes were unpaid, both Braden and Roach testified (Supp. R. 69-71) that they had discussed this fact with petitioner. The trier of fact again resolved this conflict in testimony against petitioner. The district judge's credibility determination on these issues was properly left undisturbed by the court of appeals. See *United States* v. *Yellow Cab Co.*, 338 U.S. 338.

2. Petitioner's contention (Pet. 11) that he is not liable for the unpaid taxes because the tax returns for the period in issue were not filed until after his employment had terminated is unfounded. His liability arose when the taxes were withheld, and the date of the return or of the payment has no affect on that. *Long* v. *Bacon*, 239 F. Supp. 911 (S.D. Iowa); *Tiffany* v. *United States*, 228 F. Supp. 700 (N.J.). Nor was there any impropriety in the Service's application of the proceeds from the seizure sale to the corporation's unpaid taxes (see Pet. 6), since in cases like this one where there is no agreement with the corporation, the district director may apply the proceeds as he determines. *Monday* v. *United States*, *supra*; *Datlof* v. *United States*, 252 F. Supp. 11 (E.D. Pa.), affirmed, 370 F.2d 655 (C.A. 3), certiorari denied, 387 U.S. 906.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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SEPTEMBER 1971.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. * * *

(b) *Indemnification of Employer.*—Every employer required so to deduct the tax shall be liable for the payment of such tax, and shall be indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * *

SEC. 3402. [1958 ed.] INCOME TAX COLLECTED AT SOURCE.

(a) *Requirement of Withholding.*—Every employer making payment of wages shall deduct and withhold upon such wages * * * a tax equal to 18 percent [5] of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection (b)(1).

* * * *

SEC. 6671. RULES FOR APPLICATION OF ASSESSABLE PENALTIES.

(a) *Penalty Assessed as Tax.*—The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary or his delegate, and shall be assessed and col-

[5] This percentage was changed to 14 percent by the Revenue Act of 1964, P.L. 88-272, 78 Stat. 19, Sec. 302(a).

lected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

(b) *Person Defined.*—The term "person", as used in this subchapter, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SEC. 6672. FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO EVADE OR DEFEAT TAX.

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. No penalty shall be imposed under section 6653 for any offense to which this section is applicable.

SEC. 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) *General Rule.*—Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The

amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

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